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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 9.8.2005

Coram

THE HONOURABLE MR. MARKANDEY KATJU, THE CHIEF JUSTICE

and

THE HONOURABLE MR. JUSTICE F.M.IBRAHIM KALIFULLA

Reference Case Petition No.49 of 2002

Commissioner of Central Excise,
Chennai-II. .. Applicant

versus

1. Customs, Excise & Gold (Control)
   Appellate Tribunal,
   South Zonal Bench, Chennai,
   1st Floor, Shastri Bhavan
   Annexure,
   26, Haddows Road,
   Chennai-600 006.

2. M/s. Addison & Co.
   803, Anna Salai,
   Chennai-600 002. .. Respondents

Reference Application filed under Section 35H(1) of the Central Excise Act, 1944 against the final order No.126/2002 dated 5.2.2002 passed by the Customs Excise & Gold (Control)Appellate Tribunal in the Appeal No.E/154/1994 filed by M/s. Addison & Co., Chennai order No.28/93 (M) (D) passed by the Collector of Central Excise (Appeals) Chennai dt.20.10.93, Order 18/AC/V/92 passed by the Asst.Collector of Central Excise Madras V Division dt. 27.10.92 order No.40/90 (M) passed by the Collector of Central Excise (Appeals) Chennai dt. 21.2.90 order No.72/89 passed by the Asst. Collector of Central Excise Madras V Division dt. 6.12.89.

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for applicant : Mr. K.Veeraraghavan
SCGSC.

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for respondent 2: Mr. Krishna Srinivasan
for M/s. Ramasubramaniam
Associates

JUDGMENT

(Judgment of the Court was delivered by
The Honourable The Chief Justice)

This Reference Case Petition by the Commissioner of Central Excise, Chennai-II purports to have been filed under Section 35H(1) of the Central Excise Act, 1944 (hereinafter referred to as the 'Act').

2. We have heard the learned counsel for the parties and perused the record.

3. In our opinion, this Reference Case Petition is totally misconceived and is liable to be rejected.

4. It may be mentioned that in this case the Customs, Excise and Gold (Control) Appellate Tribunal decided the assessee's appeal by order dated 7.12.1996 under Section 35C of the Act. Against that order, the assessee filed a Reference Application under Section 35G(3) of the Act which was decided in the assessee's favour by the High Court on 23.11.2000 in R.C.No.1 of 1999. The consequential order was then passed by the Tribunal under Section 35K of the Act on 5.2.2002 in conformity with the opinion of the High Court dated 23.11.2000. It is against this order under Section 35K of the Act that the Department has filed this Reference Case Petition.

5. It may be mentioned that when the High Court passes an order under Section 35K of the Act, this order is not really the final order, rather it is the opinion or advice which the High Court gives to the Tribunal under its advisory jurisdiction. The Tribunal is bound to follow this advice and then pass a final order in accordance with the advice or opinion of the High Court.

6. The position is analogous to that of the Income Tax Act, in which, on a reference under Section 256 of the Income Tax Act,1961 the High Court gives its opinion or advice, but thereafter, the matter goes back to the Income Tax Appellate Tribunal and the Tribunal passes a final order under Section 260 (1) of the Income Tax Act which is to be in conformity with the opinion or advice given by the High Court.

7. Though the High Court's advice or opinion has to be complied with by the Tribunal, such advice or opinion is not the final order rather it is the subsequent order of the Tribunal which is the final order.

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8. Under Section 35L of the Act, the assessee can file an appeal to the Supreme Court against the advisory opinion of the High Court in the reference made under Section 35G or 35H of the Act. The reference under Section 35G is against the order of the Tribunal passed under Section 35C but not the order under Section 35K. Thus, there is no provision for making a reference against an order of the Tribunal under Section 35K of the Act. We are informed that against the opinion of the High Court given in the reference under Section 35G of the Act, an appeal has already been filed under Section 35L before the Supreme Court which is pending. Of course if the Supreme Court reverses the opinion of the High Court in the reference then the Tribunal will have to pass another consequential order in conformity with the decision of the Supreme Court, but this reference petition is totally misconceived. It is accordingly dismissed.

Sd/
Asst.Registrar

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Sub Asst.Registrar

Vu

To

1.Customs, Excise & Gold (Control)
Appellate Tribunal,
South Zonal Bench, Chennai,
1st Floor, Shastri Bhavan
Annexure,
26, Haddows Road,
Chennai-600 006.

2.The Collector of Central Excise (Appeals) Chennai.

3.The Asst. Collector of Central Excise Madras V Division.

4.The Commissioner of Central Excise Chennai II.

+1cc to Mr.K.Veeraraghavan SCCG Sr 33521

TEJ (CO)
km/18.8.

R.C.P.No.49 of 2002

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